No. 98- ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AT&T WIRELESS SERVICES and MCCAW CELLULAR COMMUNICATIONS, INC.,

Petitioners,

v.

CORYELLE TENORE, CHARLES F. PETERSON and KAREN M. COLE, on behalf of themselves and all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the Washington Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the express preemption provision of 47 U.S.C. § 332(c)(3)(A) -- which prohibits regulation by States of "the rates charged" by mobile telephone service providers -- nevertheless permits plaintiffs across the country to seek rate refunds through damages awards premised on violations of state statutory and common law.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner AT&T Wireless Services, Inc. declares that it is wholly owned by AT&T Corp., a New York corporation. Petitioner AT&T Wireless Services, Inc. has no publicly traded, nonwholly owned subsidiaries.

Petitioner McCaw Cellular Communications, Inc., merged into a subsidiary of AT&T Corp., and later changed its name to Petitioner AT&T Wireless Services, Inc. Petitioner McCaw Cellular Communications, Inc. no longer exists as a separate entity.

AT&T Corp. has an equity or debt interest in the following publicly traded companies:

AT&T Credit Holdings, Inc.;

American Mobile Satellite Corporation;

Lanser Wireless Inc. (Canada); and

Teleport Communications Group Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioners AT&T Wireless Services, Inc. and McCaw Cellular Communications, Inc. (jointly, "AT&T Wireless"), respectfully request that a writ of certiorari issue to review the judgment of the Washington Supreme Court.

OPINIONS BELOW

The *en banc* decision of the Washington Supreme Court is reported at 136 Wash.2d 322, 962 P.2d 104 (1998) (Appendix to Petition for Certiorari ("App.") 1a-32a). The order of the

Superior Court of Washington for King County dismissing plaintiffs' claims is not reported (App. 33a-34a).

JURISDICTION

The judgment of the Washington Supreme Court was entered on September 10, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision in this case is the Supremacy Clause in Article VI of the United States Constitution, which provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .

U.S. Const. art. VI, cl. 2.

The statutory provision involved in this case is 47 U.S.C. § 332(c)(3)(A) (1994), which provides, in pertinent part:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

STATEMENT OF THE CASE

In 1993, Congress amended the Communications Act of 1934 ("Communications Act") to alter fundamentally the statutory system regulating wireless telecommunications services ("wireless services") in an effort to foster that industry's continued growth and development. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66,

6002(b), 107 Stat. 312, 392-93 (codified in scattered sections of 47 U.S.C.). Recognizing that wireless services "by their nature, operate without regard to state lines," Congress sought to ensure uniform regulation for these services by divesting States of "any authority to regulate . . . rates charged" by wireless telephone providers. 47 U.S.C. § 332(c)(3)(A) (1994) ("Section 332").[1]

In a decision flatly contrary to Congress' express efforts to prohibit state regulation of wireless rates, the Washington Supreme Court held that state common law and statutory actions seeking refund damages could proceed even if the award of damages in those cases will require courts retroactively to adjust wireless rates on a class-wide basis. The court's misguided decision subverts Congress' intent in an area of critical importance to the national telecommunications infrastructure. If not corrected, the holding below imperils the continued growth and development of wireless communications services that benefit citizens nationwide. Moreover, the Washington Supreme Court's decision deepens the already growing conflict among state and federal courts and administrative agencies regarding the preemptive reach of Section 332 and the proper legal analysis for deciding whether an action for monetary damages constitutes state rate regulation that is expressly preempted by federal law.

A. Statutory And Regulatory Background.

Since its inception in the early 1980's, the cellular (or more broadly, the "wireless") telephone industry has developed at an

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[1] "Commercial mobile radio service" is defined to include the cellular service provided by AT&T Wireless. The phrase includes all mobile forms of wireless communications, including cellular, personal communications service, and airplane telephone service. *Equal Access*, 9 F.C.C.R. 5408, 5416-17 (1994).

astounding rate. In just over a decade, the number of cellular telephone subscribers in the United States increased from fewer than a 100 thousand subscribers in 1984 to more than 24 million in 1995.[2] Annualized figures for 1998 indicate that the U.S. cellular industry employs more than 113,000 individuals and serves in excess of 60 million subscribers.[3] As a result of this massive and sustained growth, wireless telephone services comprise an "integral part of the national telecommunications infrastructure." H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587.

Cellular or wireless telephone service differs substantially from traditional home or office telephone service because wireless service operates largely without regard to state lines. Cellular service areas frequently include portions of multiple states. Further, because wireless telephones are portable, they routinely are used in more than one state. Indeed, a wireless call may originate in one state, the caller may drive into a second state, and the call may be routed and switched to its final destination via a third state. See Leonard J. Kennedy & Heather A. Purcell, *Section 332 of the Communications Act of 1934: A Federal Regulatory Framework That Is "Hog Tight, Horse High, and Bull Strong,"* 50 Fed. Com. L.J. 547, 550 (1998).

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[2] *See* Alfred Lee, *Land Mobile Radio Services*, in *NTIA Telecom 2000, Charting the Course for a New Century*, 286 & Table 1 (1988); U.S. Dept. of Commerce, *U.S. Industrial Handbook, Forecasts For Selected Manufacturing and Service Industries* 30-6 (Jan. 1994); *see also* John W. Berresford, *Mergers in Mobile Telecommunications Services: A Primer on the Analysis of Their Competitive Effects*, 48 Fed. Com. L.J. 247, 256 (1995).

[3] *See* Cellular Telecomm. Indus. Ass'n, *Annualized Wireless Industry Data Survey Results, June 1985 to June 1998* (1998). ‹http://www.wow-com.com/professional/reference/datasurvey/view_98datasurvey2.gif› (hereafter, "*CTIA's Annualized Survey*").

Cognizant both of the sustained growth and interstate character of wireless telephone services, in 1993, Congress amended the Communications Act to alter fundamentally the statutory structure governing wireless services in an effort to eliminate unnecessary and conflicting regulatory barriers and to foster continued growth and development. This new legislation responded to calls for measures that would encourage further investment in wireless infrastructure. H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587.

Essential to this new statutory regime was Congress' command, reflected in Section 332, that "no state or local government shall have authority to regulate 'the entry or the rates charged'" for wireless telephone service. See *State of California Regulatory Authority Over Intrastate Cellular Service Rates*, 10 F.C.C.R. 7486, 7487 (1995) (quoting 47 U.S.C. § 332(c)(3)(A)). As explained by the FCC, Section 332 was critical because Congress sought "to establish a *national* regulatory policy for [wireless communications], not a policy that is balkanized state-by-state." *Id.* at 7499.[4] Put another way, preemption of state rate regulation plays a critical role in Congress' statutory scheme because it provides for a uniform, stable and predictable regulatory environment:

> Congress intended to promote rapid deployment of a wireless telecommunications infrastructure. Robust investment is a prerequisite to achieving that goal.

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[4] President Clinton lauded the legislation overhauling the wireless regulatory regime because it "'creates the infrastructure to develop the most advanced commercial wireless communication networks the world has ever known [and will] allow an industry to grow by tens of billions of dollars by the end of the decade, producing hundreds of thousands of new high-skilled, high-wage jobs.'" Kennedy & Purcell, 50 Fed. Com. L.J. at 549-50 (quoting President Clinton, Remarks at a Communications Technology Demonstration (July 22, 1993)).

> Thus, in implementing the statute, we have attempted to facilitate the achievement of this goal by ensuring that regulation creates positive incentives for efficient investment -- rather than burdening entrepreneurial activities -- and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.

Regulatory Control of the Rates of Wholesale Cellular Service Providers, 10 F.C.C.R. 7025, 7031-32 (1995) (footnotes omitted). The only regulatory authority left to the States was regulation of "terms and conditions" of wireless service other than "rates." 47 U.S.C. § 332(c)(3)(A) (1994).[5] This legislative overhaul has produced enormous public benefits; since 1993, for example, the wireless industry has attracted almost $40 billion in additional capital investments. See *CTIA 's Annualized Survey supra* note 3.

B. The Proceedings Before The Trial Court.

AT&T Wireless has direct and indirect ownership interests in wireless license holders that provide wireless telephone service to more than 9 million subscribers in all 50 states. AT&T Wireless offers its customers many different rate plan options, including a number of nationwide discounted calling plans. Virtually all of AT&T Wireless' rate plans, like those of most competing wireless providers, include a per-minute charge for airtime use. And, like other wireless (and long-distance) carriers, AT&T Wireless follows the long-standing, industry-

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[5] As this Court has recognized, however, "[r]ates . . . do not exist in isolation" and "have meaning only when one knows the services to which they are attached." *AT&T Co.* v. *Central Office Tel., Inc.*, 118 S. Ct. 1956, 1963 (1998). As a result, this Court warned that lower courts must be cognizant that a claim for "excessive rates can be couched as a claim for inadequate services and vice versa." *Id.*

wide practice of "rounding up," *i.e.*, charging customers for telephone services based on the length of the telephone call using full-minute increments.[6] Put another way, customers are charged for a full minute when they make a wireless call that lasts only part of a minute.

On October 24, 1995, Plaintiffs-Respondents Coryelle Tenore, Charles F. Peterson and Karen M. Cole ("Respondents") filed a class-action lawsuit against AT&T Wireless, raising state law claims for breach of contract, misrepresentation, fraud, and violations of the Washington Consumer Protection Act. App. 4a. Respondents' claims are based on allegations that AT&T Wireless did not adequately disclose its practice of charging customers in full-minute increments. App. 3a. Respondents' Second Amended Complaint includes a putative "regionwide" class of all AT&T Wireless customers in Washington, Oregon, Alaska, Idaho and Utah who "have been subject to having their airtime charges rounded up to the next full minute." App. 39a.

Although Respondents disclaim any effort to "change, diminish, or modify the rates being charged by [AT&T Wireless]," App. 37a, the relief they seek, if permitted, would do precisely that. Indeed, in their complaint, Respondents expressly ask for "compensatory damages in the form of a refund of the difference between the amounts charged by [AT&T Wireless] and the amount, if any, which cellular users would have incurred if [AT&T Wireless] did not engage in this

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[6] Charging customers in full-minute increments is a standard practice among providers of long distance, cellular, airplane telephone, and other telecommunications services. Indeed, as the Washington Supreme Court noted, "[l]ong distance carriers have historically used full-minute billing." App.3a n.6; *see also Alicke* v. *MCI Communications Corp.*, 111 F.3d 909, 912 (D.C. Cir. 1997) (noting that, until recently, "long distance service has always been listed and billed" in "whole-minute increments").

practice." *Id.*[7] Thus, the relief sought by Respondents requires the court to impose both a billing increment other than the full-minute system used by AT&T Wireless and a corresponding "rate" applicable to that new increment. As a result, the effect of the relief sought by Respondents would be to require wireless providers retroactively to charge their customers different rates depending on the vagaries of law of individual states.[8]

Respondents' lawsuit is but one in a series of such lawsuits filed across the country against virtually every service provider in the wireless industry attacking how wireless calls are charged. Since 1995, more than 45 of these cases have been filed against wireless carriers throughout the country. App. 52a-57a (listing cases filed against wireless and long-distance carriers since 1995). All told, the potential damages sought in these lawsuits amount to *many* hundreds of millions of dollars. Indeed, in this case alone, Respondents claim that AT&T Wireless' practice of charging its customers in full-minute increments "result[ed] in

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[7] Respondents also seek an injunction preventing AT&T Wireless from charging customers based upon the practice of "rounding up *without disclosing the practice.*" App. 37a (emphasis added). That request for injunctive relief is particularly peculiar because Respondents have no need for such future disclosures given that they admittedly are aware that AT&T Wireless bases its wireless telephone rates on the practice of rounding each telephone call to a full-minute increment. App. 36a. In any event, such claims for future disclosures are moot because, as explained in a separate case, "AT&T Wireless's promotional materials now explain the practice of rounding up in connection with billing for calls." *Hardy* v. *Claircom Communications Group, Inc.*, 937 P.2d 1128, 1132 n.3 (Wash. App. 1997).

[8] *Cf. Keogh* v. *Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 163 (1922) (rejecting claim for damages based on allegations of payment "of a rate higher than that which would have otherwise prevailed" because "the amount recovered might, like a rebate, operate to give [the plaintiff] a preference" over other customers).

millions of dollars of excess billing by [AT&T Wireless]." App. 36a.

The monetary relief being sought in these cases -- widespread refunds for millions of customers -- necessarily will require triers of fact retroactively to adjust wireless rates. Indeed, these class action lawsuits propose to resolve claims on a statewide, regionwide, even nationwide basis going back as many as six years.[9] In other words, plaintiffs across the country are asking courts to apply state law to regulate rates, not just for one or two customers, and not just for a single carrier's entire customer base, but for virtually the entire wireless industry.

On April 29, 1997, AT&T Wireless filed a motion to dismiss Respondents' claims because, among other things, they were preempted by federal law. App. 4a. In support of its motion, AT&T Wireless demonstrated that an award of refund damages based on a new billing increment would amount to state rate regulation in violation of Section 332. Respondents claimed that Section 332 does not preempt their claims because they challenge only the adequacy of AT&T Wireless' disclosures concerning its practice charging customers in full-minute increments. App. 6a.

In reply, AT&T Wireless explained that Section 332 preempts state law claims -- even failure-to-disclose claims -- when, as here, an award of damages would result in the regulation of wireless telephone rates. That is, an award of refund damages in this case would result in rate regulation

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[9] *See, e.g., Tenore* v. *AT&T Wireless Servs., Inc.*, 962 P.2d 104, 105-06 (Wash. 1998) (regionwide class); *DeCastro* v. *AWACS, Inc.*, 935 F. Supp. 541, *appeal dismissed*, 940 F. Supp. 692 (D.N.J. 1996) (statewide class); *Carroll* v. *Cellco Partnership*, Docket Nos. AM-001316-96T3, AM-001303-96T3 (N.J. Super. Ct. App. Div., June 25, 1997) (nationwide case).

because the court retroactively must determine what AT&T Wireless may charge based on a different billing increment than the full-minute rate charged by AT&T Wireless. However labeled, the clear and direct effect of the relief Respondents seek would be to regulate AT&T Wireless' rates under state statutory and common law standards. See *Competitive Market Conditions with Respect to Commercial Mobile Servs.*, 10 F.C.C.R. 8844, 8868 (1995) (billing increment is a necessary component of wireless rates).[10]

While AT&T Wireless' Motion to Dismiss was pending, the Washington State Court of Appeals held that a virtually identical full-minute billing claim was preempted by Section 332. *Hardy* v. *Claircom Communications Group*, 937 P.2d 1128 (Wash. App. 1997).[11] The trial court in the present case agreed with the *Hardy* Court's analysis, concluded that *Hardy* also controlled the present case, and dismissed Respondents' claims because they too were preempted by Section 332. App. 33a-34a.

C. The Washington Supreme Court's Decision.

Respondents appealed the trial court's decision directly to the Washington Supreme Court, arguing that their claims were not preempted and that the *Hardy* decision should not control.

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[10] *See also Black's Law Dictionary* 1261 (6th ed. 1990) (defining "rate" as "a charge, valuation, payment or price fixed according to ratio, scale or standard").

[11] The plaintiff in *Hardy* asserted the same claims against Claircom Communications Group, a division of AT&T Wireless that provides airplane telephone service for airline passengers. *Id.* at 1130. The *Hardy* Court held that Section 332 preempted those claims because an award of refund damages would require the court to engage in precisely the sort of rate regulation that Congress prohibited. *Id.* at 1133.

On September 10, 1998, the Washington Supreme Court reversed the trial court's decision, holding that Respondents' misrepresentation, fraud, and consumer protection act claims were not preempted by Section 332. App. 31a-32a.[12] After canvassing the many conflicting decisions relied upon by Respondents and AT&T Wireless, App. 17a-23a, the lower court ultimately relied upon *Nader* v. *Allegheny Airlines*, 426 U.S. 290 (1976) -- a decision which, unlike this case, involved (1) a statutory scheme that lacked any express preemption provision, *id.* at 301, and (2) a challenge to a practice for which the federal agency charged by Congress with regulatory authority over the practice expressly permitted individuals to advance state common-law claims, *id.* at 306 -- to hold that there was "sufficient reliable authority . . . to conclude that the state law claims brought by Appellants and the damages they seek do not implicate rate regulation prohibited by Section 332." App. 25a.

In essence, the court ruled that Section 332 did not preempt Respondents' state law claims because there were no filed tariffs:

> [A] challenge to a practice that is not governed by a tariff filing does not implicate the "conflict" inherent in contesting a . . . rate expressly regulated by an agency and . . . any impact on rates is "merely incidental."

App. 31a.[13] As a result, the Washington Supreme Court held that "the State law claims brought by [Respondents] and the

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[12] Respondents did not appeal the dismissal of the breach of contract claims. App. 4a n.13.

[13] In fact, the FCC continues to regulate wireless rates in the absence of filed tariffs under 47 U.S.C. § 201(b) (1994). *See Implementation of Sections 3(n) and 332 of the Communications Act*, 9 F.C.C.R. 1411, 1479 (1994).

damages they seek do not implicate rate regulation prohibited by Section 332." App. 25a.[14]

REASONS FOR GRANTING THE PETITION

Review of the Washington Supreme Court's decision is urgently needed. Despite Congress' clear statement in Section 332 that States cannot regulate wireless rates, the Washington Supreme Court has allowed state law claims for refund damages that will require state courts to engage in prohibited rate regulation. As a result, the Washington Supreme Court's decision thwarts Congress' intent to remove States from the rate regulation arena and to free wireless providers from conflicting state rate regulations that will otherwise threaten the development of an integral part of the

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[14] The *Tenore* court expressly refrained from addressing the ultimate merits of Respondents' state law claims. App. 26a n.108. Although the Washington Supreme Court envisioned further proceedings before the trial court, its decision falls comfortably within the jurisdiction of this Court. *See, e.g., Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-83 (1975). Here, the Washington Supreme Court squarely confronted and decided the issue of federal preemption under Section 332; reversal of the *Tenore* decision will preclude further litigation in this case; and without immediate review the Washington Supreme Court's decision "might seriously erode federal policy" pertaining to the uniform federal system of regulation of a fast-growing and critical component of the national telecommunications infrastructure. *See id.*; *see also Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 370 n.11 (1988) (holding that state-court judgment ripe for review despite fact that "further proceedings will be held on remand" because "[t]he critical federal question -- whether federal law preempts such proceedings . . . already [has] been answered by the State Supreme Court"); *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 180 (1988) (holding that State Supreme Court's rejection of federal preemption claim was "a final judgment for purposes of 28 U.S.C. § 1257(2)"); *cf. American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 225-26 (1995) (reviewing, on the merits, Illinois Supreme Court's denial of a motion to dismiss state law claims of breach of contract and Illinois' Consumer Fraud and Deceptive Business Practices Act based on federal preemption).

national telecommunications infrastructure. Indeed, the decision below gives courts *carte blanche* to apply state law retroactively to adjust rates for wireless carriers through damage awards.

In doing so, the Washington Supreme Court's decision undermines a core federal policy that Congress had hoped to further by enacting Section 332 -- providing regulatory uniformity and stability for the wireless telephone industry. Indeed, rather than uniformity and stability, the Washington Supreme Court's decision promises increased regulatory uncertainty. The impact of this case is magnified because scores of similar class action lawsuits are pending against virtually every major wireless carrier in the country. The Washington Supreme Court's decision highlights and adds to the already widespread conflict and confusion among state and federal courts and agencies.

Finally, the Washington Supreme Court's decision conflicts with this Court's most recent opinion on the meaning of rates under the Communications Act; decisions from this Court establishing that awards of refund damages constitute rate regulation; and decisions by this Court establishing the standards for deciding the scope of express preemption provisions.

THE WASHINGTON SUPREME COURT'S DECISION CONTRAVENES THE INTENT OF CONGRESS AND, IF UNCORRECTED, WILL HAVE A PROFOUND, ADVERSE IMPACT ON THE WIRELESS INDUSTRY.

Virtually every major wireless carrier in the country has been the target of class action lawsuits attacking how their calls are charged. Although many of these cases are disguised as "disclosure" claims, they all assert that customers have been overcharged and seek damages in the form of retroactive refunds. In a very practical way, then, Congress' statutory structure governing an important component of the national telecommunications industry has been imperiled.

Section 332 defines the balance of power between the state and federal governments over the regulation of the wireless industry and reflects Congress' determination that federal law should preempt all state regulation of rates charged by wireless carriers:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(3)(A) (1994). As demonstrated above, see *supra* 3-6, Section 332 was considered necessary by Congress and the FCC to ensure a predictable and uniform regulatory policy for wireless rates by eliminating state-by-state determinations of what and how rates should be charged for services that routinely cross state boundaries and are otherwise regional or national in scope. See *State of California Regulatory Authority Over Intrastate Cellular Service Rates*, 10 F.C.C.R. 7486, 7499 (1995) (explaining that Congress intended that Section 332 would "establish a *national*

regulatory policy for [wireless services], not a policy that is balkanized state-by-state") (footnote omitted). Congress' goals of ensuring "regulatory symmetry" and providing a "stable and predictable" regulatory environment for wireless carriers are threatened by conflicting decisions in the federal and state courts interpreting the proper scope of Section 332.

A. There Is A Patchwork Of Conflicting And Confusing Decisions Interpreting Section 332.

The Washington Supreme Court's decision starkly illustrates the confusion in state and federal courts and state and federal regulatory agencies over the meaning and scope of Section 332.

1. Quite literally, state and federal decisions involving Section 332 preemption are all over the map. For example, at least one court has concluded that *all* state law claims having an impact on wireless rates are preempted by Section 332. See *Simons* v. *GTE Mobilnet, Inc.*, No. H-95-5169 (S.D. Tex. Apr. 11, 1996) ("[A]ll state law claims related to the field of rate regulation are completely preempted by section 332(c)(3)(A)") (App. 62a). A number of other courts have ruled that Section 332 preempts state law claims challenging the reasonableness of wireless billing practices. See, *e.g.*, *Ball* v. *GTE Mobilnet of California, Ltd.*, No. 98AS03811 (Cal. Super. Ct. (Sacramento County) Nov. 17, 1998) (dismissing "rounding up" and related claims under Section 332 because they challenged the method of calculating the length and rate for wireless service) (App. 63a-64a). Several courts have ruled that even "disclosure" claims are preempted, if the request for damages requires courts retroactively to adjust rates. See, *e.g.*, *Rogers* v. *Westel-Indianapolis Co.*, No. 49D03-9602-CP-0295 (Marion Super. Ct. (Ind.) July 1, 1996) (App. 65a-66a); *Powers* v. *AirTouch Cellular*, No. N71816 (Cal. Super. Ct. (San Diego County) Oct. 6, 1997) (App. 68a-69a). In

contrast, at least one court has refused to preempt any disclosure claims, regardless of the damages sought and regardless of how directly the claims challenged wireless rates. See *Carroll* v. *Cellco Partnership*, Docket Nos. AM-001316-96T3 and AM-001303-96T3 (N.J. Super. Ct., App. Div., June 25, 1997) (App. 70a-71a).[15]

The FCC's decision, based on legislative authority, to lift the filed tariff requirement for wireless carriers has resulted in much of the confusion among the lower courts. See *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 F.C.C.R. at 1479 (citing 47 U.S.C. § 332(c)(1)(C)). Although the FCC's ruling was meant to ease the regulation of wireless services and to provide an opportunity for market forces to set rates in this vigorously competitive industry, ironically, courts have interpreted the absence of a filed tariff requirement as a basis for concluding that state law regulation in the form of rate refund damages claims survive despite the express preemption provision of Section 332. In essence, many courts have unduly limited the preemptive reach of Section 332 by reasoning that, because the challenged rates were not subject to filed tariffs, retroactive state law adjustments to those rates and rate structures are not preempted at all. See, *e.g.*, App. 25a.

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[15] Courts applying the doctrine of "complete preemption" have likewise disagreed about whether the preemptive force of the Communications Act, including Section 332, is sufficiently strong to support removal of state law claims to federal court. *See, e.g., Lee* v. *Contel Cellular of the South, Inc.*, 1996 U.S. Dist. LEXIS 19636, at *9, *13-*14 (S.D. Ala. 1996) (holding that contract claims completely preempted by Section 332; tort claims not completely preempted); *In re Comcast Cellular Telecomm. Litig.*, 949 F. Supp. 1193, 1205-06 (E.D. Pa. 1996) (holding that, under the artful pleading doctrine, contract and statutory claims were not removable to federal court, but tort claims were removable); *Sanderson* v. *AWACS, Inc.*, 958 F. Supp. 947, 956-58 (D. Del. 1997) (no claims were completely preempted).

2. State regulatory agencies likewise disagree over the scope of Section 332. For example, California's Public Utilities Commission ("CPUC") has ruled that under Section 332 it has no jurisdiction to award refund damages because to do so requires rate setting. See *Nova Cellular West, Inc.* v. *AirTouch Cellular of San Diego*, Case No. 98-02-036 (CPUC Sept. 3, 1998) (ordering wireless carrier to adjust its rates and pay a refund is ratemaking) (App. 75a-77a, 78a).[16] Other state regulatory agencies have read Section 332 to be far more limited, concluding that Section 332 preempts only specific determinations of the reasonableness of wholesale wireless rates. See, *e.g.*, *Westside Cellular, Inc.* v. *GTE Mobilnet, Inc.*, 1995 Ohio PUC LEXIS 240, at *6-*9 (Mar. 23, 1995).

The uncertain scope of Section 332 also has fostered significant confusion in a host of proceedings before the Federal Communications Commission ("FCC") and threatens to undermine other federal policies of that agency. For example, "universal service" funding designed to make telephone service reasonably priced and broadly available across the nation depends, in part, on substantial payments by wireless carriers based on their charges for both interstate and intrastate services. See 47 U.S.C. § 254; *Federal-State Joint Board on Universal Serv.*, 12 F.C.C.R. 8776, 9175, 9181 (1997). Effective implementation of this important policy rests on the assumption that "section 332(c)(3) . . . alters the 'traditional' federal-state

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[16] There, a reseller challenged a wireless carrier's refusal to provide electronic billing service with certain rates. The CPUC rejected the reseller's argument that the case was a billing dispute and not a dispute about rates: "In this case, mandating that AirTouch provide particular services at given rates is functionally identical to requiring AirTouch to provide its given services at particular rates. Both actions would constitute 'rate regulation,' and neither remedy is permitted under Section 332." *Id.* (App. 78a); *see also California Wireless Resellers Ass'n v. Los Angeles Cellular Telephone Co.*, No. 98-06-055 (CPUC Nov. 5, 1998) (App. 81a-87a).

relationship with respect to [wireless services] by prohibiting states from regulating rates," and will be undermined if these charges are subject to retroactive adjustment through state law damage awards. See *Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 5318, 5489 (1997).[17] Yet, with respect to intrastate services (a line that is, by its nature, difficult to draw in the wireless context), there has been no conclusive determination regarding the scope of FCC jurisdiction to regulate carriers' billing practices. See *Truth-in-Billing and Billing Format*, 1998 F.C.C. LEXIS 4849 ¶ 13 at *18-*19 (Sept. 17, 1998) (Notice of Proposed Rulemaking seeking comment on "whether the Commission has jurisdiction" to regulate carriers' billing practices).[18]

In short, the lower courts and federal and state regulatory agencies are divided on this important and recurring question of federal law: Whether Section 332 preempts state law claims if, to measure an award of money damages, a court must apply

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[17] *See also Metro Mobile Cts., Inc.*, Nos. CV-95-0051275S, CV-95-05500965, 1996 WL 737480 (Conn. Super. Ct. Dec. 11, 1996); *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753, 800 (8th Cir. 1997) (regulation of interconnection fees charged by local exchange carriers to wireless carriers), *cert. granted*, 118 S. Ct. 879 (1998).

[18] Separately, the FCC opened a proceeding following a federal court's determination -- contrary to the decision below -- that a primary jurisdiction referral on the issue of the scope of Section 332 rate regulation was appropriate. *See* FCC Pub. Notice, DA-97-2464 (Nov. 24, 1997) (following referral from *Smilow* v. *Southwestern Bell Mobile Sys.*, 1997 U.S. Dist. 19453, *10-11 (D. Mass. July 11, 1997)). The settlement of a related case against the same wireless carrier, however, has effectively disposed of the "rounding up" claims presented to the FCC. *See Penrod* v. *Southwestern Bell Mobile Sys.*, No. 96-L-132 (Ill. Cir. Ct. (Madison County)); *cf.* FCC Pub. Notice, DA-98-945, 1998 F.C.C. LEXIS 2332, *1 (May 18, 1998) (seeking comments regarding alleged failure to disclose in filed tariffs the practice of charging customers in full-minute increments).

state law to determine retroactively the appropriate charges for wireless service. Resolution of that issue by this Court potentially would be controlling in dozens of pending class action lawsuits involving virtually every major wireless carrier and their tens of millions of customers.

B. The Washington Supreme Court's Decision Provides An Ideal Vehicle For This Court To Resolve The Conflicts Regarding The Preemptive Scope Of Section 332.

The Washington Supreme Court's decision squarely presents the issue whether courts can, in effect, retroactively set wireless rates when awarding damages pursuant to state statutory and common law causes of action.

In Section 332, Congress chose clear and unmistakable language dictating that no State "shall have any authority to regulate . . . rates." 47 U.S.C. § 332(c)(3)(A) (1994). Despite that expansive prohibition, Respondents explicitly sought compensatory damages in the form of a rate refund based upon what they would have been charged had AT&T Wireless not engaged in the challenged conduct. App. 4a. The Washington Supreme Court expressly sanctioned such claims by holding that the damages sought by Respondents did not "implicate rate regulation." App. 25a. As a result, the Washington Supreme Court's decision squarely presents the overarching issue of the proper scope of Section 332. Subsumed within this overarching question are several recurring issues of national importance that have generated conflicts among the lower courts and thus warrant resolution by this Court.

First, whether an award of damages is permissible requires a determination of what types of claims constitute a challenge to wireless service "rates." In a related context, this Court recently cautioned against adopting too restrictive a definition of "rates." *Central Office Telephone*, 118 S. Ct. at 1963. In

Central Office Telephone, long distance resellers alleged that AT&T Corp., in violation of state contract and tort law, had promised, but never delivered, various service and billing options in addition to those set forth in the tariffed rates filed with the FCC. The Court held that both claims were preempted under the filed tariff doctrine, rejecting the Ninth Circuit's holding that the claims did not involve rates or ratesetting. *Id.* at 1963.

> The Ninth Circuit thought the filed-rate doctrine inapplicable "[b]ecause this case does not involve rates or ratesetting, but rather involves the provisioning of services and billing." Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa.

Id. (quoting *Central Office Telephone, Inc.* v. *AT&T Co.*, 108 F.3d 981, 990 (9th Cir. 1997) (alteration in original; citation omitted)).

Here, the Washington Supreme Court dismissed *Central Office Telephone* as irrelevant because that case involved the "filed tariff" doctrine. App. 11a n.48. Instead, the court interpreted the term "rates" narrowly, holding that the damages sought by Respondents do not represent a challenge to the "rates" for wireless service provided by AT&T Wireless. App. 25a. But, as the FCC has recognized, the billing increment is an integral component of a wireless rate. See *Competitive Market Conditions with Respect to Commercial Mobile Servs.*, 10 F.C.C.R. at 8868. Thus, regardless whether there is a tariff, wireless rates have meaning only when one knows the billing increment by which they are calculated. The contrary conclusion by the Washington Supreme Court conflicts with this Court's analysis in *Central Office Telephone* and the decisions

of other state and federal courts that have, consistent with *Central Office Telephone*, adopted a broader and more practical reading of the term "rates" with respect to Section 332.[19]

Second, this case also presents the issue whether an award of money damages amounts to "regulation" within the meaning of Section 332. Generally, the common-sense and ordinary meaning of "regulate" is broad: to regulate is to "govern or direct according to rule," to "fix, establish, or control," and to "subject to governing principles or laws." *Black's Law Dictionary* 1286 (6th ed. 1990).[20] Thus, damage awards unquestionably *can* constitute a form of state regulation that is indistinguishable from legislative or executive activity. As this Court has held:

> [R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959); see also *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring) ("'[state] regulation can be as effectively exerted through an award of damages as through some form of preventative relief.'") (alteration in original)

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[19] *See Simons* v. *GTE Mobilnet, Inc.*, No. H-955169 (U.S.D.C., S.D. Tex. Apr. 11, 1996) (App. 62a); *Powers* v. *AirTouch Cellular*, No. N71816 (Cal Super. Ct. (San Diego County) Oct. 6, 1997) (App. 68a-69a); *see also Marcus* v. *AT&T Corp.*, 938 F. Supp. 1158, 1170 (S.D.N.Y. 1996), *aff'd*, 138 F.3d 46 (2d Cir. 1998); *Nova Cellular West, Inc.* v. *AirTouch Cellular of San Diego*, No. 98-02-036 (CPUC Sept. 3, 1998) (App. 75a-77a).

[20] *See also Storer Cable Communications v. City of Montgomery*, 806 F. Supp. 1518, 1543 (M.D. Ala. 1992); *Bishop v. Provident Life and Casualty Insurance Co.*, 749 F. Supp. 176, 178 (E.D. Tenn. 1990).

(quoting *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 521 (1992)); *id.* at 510 (O'Connor, J., concurring in part and dissenting in part) ("A majority of the Court agreed that state common-law damages actions do impose 'requirements'"); *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 578-79 (1981). This Court, however, has not established a definitive framework for determining whether damage awards do, in fact, constitute "regulation," and the lower court decisions on precisely that important issue are in conflict. Compare App. 25a with *Powers* v. *AirTouch Cellular*, No. N71816 (Cal. Super. Ct. (San Diego County) Oct. 6, 1997) (App. 68a-69a).

Here, the Washington Supreme Court acknowledged that "damage awards [may be] tantamount to rate regulation," App. 21a & n.87, but ruled that this legal conclusion is reserved for cases where "the 'filed rate' doctrine was implicated or the claims were completely preempted by the agency's exclusive and plenary authority." App. 22a. Put another way, the court disregarded the practical reality that refund damages require retroactive ratesetting on the theory that state law is preempted only where federal rate regulation occurs through the formal filed tariff process. That holding conflicts with decisions by other courts, which have concluded that similar claims for damages constitute state rate regulation prohibited by Section 332 regardless of any tariff filing. See *Simons* v. *GTE Mobilnet, Inc.*, No. H-955169 (U.S.D.C., S.D. Tex. Apr. 11, 1996) (App. 62a); *Powers* v. *AirTouch Cellular*, No. N71816 (Cal. Super. Ct. (San Diego County) Oct. 6, 1997) (App. 68a-69a).[21]

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[21] *See also Arkansas La. Gas*, 453 U.S. at 578-79 (damage actions are disguised retroactive rate adjustments); *Fax Telecommunicaciones v. AT&T Co.*, 952 F. Supp. 946, 954 (E.D.N.Y. 1996) (enforcing a contract rate that requires a court to determine a reasonable rate is unlawful ratemaking); *Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1119-22 (S.D.N.Y. 1992) (refund damages award would effectively require a court to determine a reasonable rate), *aff'd*, 27 F.3d 17 (2d Cir. 1994).

Accordingly, this case squarely presents the issue whether damage awards can amount to "rate regulation prohibited by Section 332." App. 25a.

Third, and more generally, the Washington Supreme Court's decision conflicts with the standards established by this Court for analyzing whether state law claims are preempted under an express preemption provision. See, *e.g.*, *American Airlines*, 513 U.S. at 226-27; *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This Court consistently has ruled that when Congress enacts an express preemption statute, the preemptive scope of the statute is governed, first and foremost, "by the express language" of the statute. *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 517 (1992); see also *Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992) (same).[22] At its core, the issue of preemption is a matter of statutory intent, and the Court accordingly begins with "'the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *FMC Corp.* v. *Holliday*, 498 U.S. 52, 57 (1990)).

Nowhere in its decision below does the court mention, let alone analyze, the critical role played by the statutory language and legislative intent reflected in the express preemption provision of Section 332. Instead, the Washington Supreme Court's decision rests on its analysis whether the award of damages in this case presents an actual and direct conflict with a rate determined by the FCC to be reasonable such that a court would be required to "'substitute its judgment for the agency's on the reasonableness of a rate.'" App. 26a. In basing its

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[22] Although Congress' intent is primarily discerned from the language of the statute, courts must also look to the "'structure and purpose of the statute as a whole.'" *Medtronic*, 518 U.S. at 485.

analysis on this erroneous and cramped "conflict" standard, the Washington Supreme Court's decision is inconsistent with express preemption decisions from this Court,[23] and in direct conflict with subsequent decisions by lower state and federal courts. See *Simons* v. *GTE Mobilnet, Inc.*, No. H-955169 (U.S.D.C., S.D. Tex. Apr. 11, 1996) (App. 62a); *Powers* v. *AirTouch Cellular*, No. N71816 (Cal. Super. Ct. (San Diego County) Oct. 6, 1997) (App. 68-69a).

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[23] *See, e.g., American Airlines*, 513 U.S. at 227 (preempting state consumer protection act claims because of potential for "intrusive regulation" of business practices inherent in that type of legislation); *Cipollone*, 505 U.S. at 523-24 (preempting failure-to-warn claims under state law based on statute that prohibited "requirement or prohibition imposed under State law").

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDICES

APPENDIX A

CORYELLE TENORE, CHARLES F. PETERSON AND KAREN M. COLE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, Appellants v. AT&T WIRELESS SERVICES AND MCCAW CELLULAR COMMUNICATIONS, INC. D/B/A CELLULAR ONE, Respondents.

Number 65609-6

SUPREME COURT OF WASHINGTON,

En Banc.

Argued May 19, 1998.

Decided Sept. 10, 1998.

Steve Berman, Erin K. Flory, Seattle, for Appellants.

Stokes, Eitelbach & Lawrence, Michael Kipling, Laura J. Buckland, Kelly Noonan, Seattle, for Respondents.

SMITH, Justice.

Appellants Coryelle Tenore, Charles F. Peterson and Karen M. Cole, on behalf of themselves and all others similarly situated, seek direct review of a judgment of the King County Superior Court which dismissed their class action lawsuit on a Civil Rule (CR) 12(b)(6) motion based upon federal preemption of state law claims under 47 U.S.C. sec. 332(c)(3)(A) and the doctrine of primary jurisdiction. We granted review. We reverse the trial court.

QUESTION PRESENTED

The question presented is whether the trial court was correct in dismissing Appellants' state law claims on a CR 12(b)(6) motion based upon federal preemption under 47 U.S.C. sec. 332(c)(3)(A) and the doctrine of primary jurisdiction.

STATEMENT OF FACTS

On October 24, 1995, Appellants Coryelle Tenore, Charles F. Peterson and Karen M. Cole, individually and on behalf of others similarly situated, filed in the King County Superior Court a class action complaint against Respondents AT&T Wireless Services and McCaw Cellular Communications, Inc. d/b/a Cellular One.[1] Respondent AT&T Wireless Services (AT&T) is a wholly owned subsidiary of AT&T Corporation and provides cellular service in the Northwest region.[2] McCaw Cellular Communications, Inc. d/b/a Cellular One (McCaw Cellular), also named as a defendant, was the largest provider of cellular telephone service in the country until it merged with AT&T.[3] McCaw Cellular no longer exists as a separate entity.[4]

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[1] Br. of Appellants at 3.

[2] Clerk's Papers at 7, 155, 158. Respondents note that AT&T Wireless itself does not hold any cellular licenses, but instead provides cellular telephone service through direct and indirect ownership interests in cellular license holders.

[3] *Id.* at 158. As of 1996, cellular service was in existence for over 13 years, growing at the rate of 50 percent per year. John W. Berresford, *Mergers in Mobile Telecommunications Services: A Primer on the Analysis of Their Competitive Effects*, 48 Fed. Comm. L.J. 247, 256 (1996).

[4] Respondents AT&T and McCaw Cellular, are collectively referred to in this opinion as "AT&T."

In their Second Amended Class Action Complaint, Appellants claimed that Respondent AT&T engaged in "deceptive, fraudulent, misleading and/or unfair conduct" by not disclosing its practice of "rounding" airtime in order to "induce cellular customers to use its cellular service, and/or in order to unfairly profit."[5] "Rounding," "rounding up" or "full minute billing" is a common billing practice in the cellular and long distance telephone industry where fractions of a minute are rounded up to the next highest minute.[6] For example, a call that lasts one minute and one second is charged as a two-minute call, but the subscriber is not informed of the actual duration of the call.[7] Appellants claim this billing practice "results in millions of dollars of excess billing . . . all at the expense of the unwary customer."[8] Appellants additionally claim this practice is "contrary to the 'Service Agreement' . . . which states that the customer is billed only for 'the time you press send until the time you press end.'"[9]

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[5] Clerk's Papers at 156.

[6] *Id.* at 8. Long distance carriers have historically used full minute billing. In a similar class action full minute billing case, the United States Court of Appeals for the District of Columbia recently affirmed dismissal of fraud, negligent misrepresentation, and false advertising claims, holding that no reasonable customer of the long distance telephone service provider could actually have been misled by the standard and traditional practice of billing in whole minute increments. *Alicke v. MCI Comm's. Corp.*, 324 U.S. App. D.C. 150, 111 F.3d 909, 912 (D.C. Cir. 1997).

[7] Clerk's Papers at 156.

[8] *Id.*

[9] *Id.*

Also, Appellants claim cellular customers do not receive the full minutes they have contracted for at a fixed rate under their service plan because of rounding.[10] For example, all subscribers are required to choose between plans that offer varying specified minutes of airtime, such as 30, 60, or 100 minutes, for a fixed monthly rate, beyond which calls are billed at a specified per-minute rate.[11] But a 30-minute plan may not in fact provide 30 full minutes because of rounding. This is what Appellants claim AT&T should have disclosed.[12]

Appellants filed state law claims in the King County Superior Court for breach of contract,[13] negligent misrepresentation, fraud, and violation of the Washington Consumer Protection Act (CPA) under RCW Chapter 19.86.[14] They requested, among other things, injunctive relief and compensatory damages in the form of a refund of the difference between the amount charged by AT&T and the amount class members would have incurred if AT&T had not engaged in the practice of rounding up without disclosing it.[15] On April 29, 1997, AT&T moved for dismissal of the complaint by a CR 12(b)(6) motion based upon federal preemption of state law claims under 47 U.S.C. sec. 332(c)(3)(A) and the doctrine of

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[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Appellants no longer dispute the breach of contract claim on appeal. Br. of Appellants at 1.

[14] Clerk's Papers at 164-65

[15] *Id.* at 156-57, 166-67.

primary jurisdiction.[16] 47 U.S.C. sec. 332(c)(3)(A) provides in relevant part:

> Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and condition of commercial mobile services.

AT&T contends this statute preempts Appellants' state law claims because the monetary relief sought by Appellants would necessarily require a court to engage in rate regulation in determining the refund award for partial minutes of cellular service.[17] AT&T further claims, under the doctrine of primary jurisdiction, that any challenge to the reasonableness of cellular rates must be deferred to the agency with expertise in rate regulation in this case, the Federal Communications Commissions (FCC).[18]

While AT&T's motion to dismiss was pending, the Court of Appeals, Division I, filed its decision in *Hardy v. Claircom Comm's. Group, Inc.*,[19] a case with a similar fact pattern to this one. The King County Superior Court, the Honorable J. Kathleen Learned, agreed with AT&T that *Hardy* is controlling and granted its motion to dismiss on June 13, 1997, stating:

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[16] *Id.* at 26.

[17] *Id.* at 9.

[18] *Id.* at 23.

[19] 86 Wash. App. 488, 937 P.2d 1128 (1997).

> The Court concludes as a matter of law that this case is controlled by Hardy v. Claircom and therefore the plaintiffs' state law claims are preempted by 47 U.S.C. sec. 332(c)(3)(A), and/or that the doctrine of primary jurisdiction requires that plaintiffs' claims be referred to the FCC.[20]

Appellants, however, contend they are only challenging the allegedly misleading advertising practices of AT&T and not the underlying rates or charges.[21] They argue it is within the authority of state courts to resolve their state law claims without FCC intervention.[22] After the order of dismissal, Appellants sought direct review by this Court, which we granted on January 6, 1998.

DISCUSSION

Standard of Review

Under CR 12(b)(6), a complaint can be dismissed for "failure . . . to state a claim upon which relief can be granted." A dismissal under this rule involves a question of law which is reviewed de novo by an appellate court and is appropriate only if it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery.[23] In such a case, a plaintiff's allegations are presumed to be true and a court may

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[20] Order of Dismissal. Clerk's Papers at 279.

[21] Br. of Appellants at 6.

[22] *Id.* at 29-30.

[23] *Hoffer v. State*, 110 Wash. 2d 415, 420, 755 P.2d 781 (1988), *aff'd*, 113 Wash. 2d 148, 776 P.2d 963 (1989); *Bravo v. Dolsen Cos.*, 125 Wash. 2d 745, 750, 888 P.2d 147 (1995).

consider hypothetical facts not included in the record.[24] CR 12(b)(6) motions should be granted "sparingly and with care" and "only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief."[25]

Hardy v. Claircom Communications Group, Inc.

In dismissing Appellants' complaint, the trial court concluded as a matter of law that it was bound by the decision of the Court of Appeals, Division I, in *Hardy v. Claircom Comm's. Group, Inc.*,[26] the only Washington case addressing the specific issues now before this Court.[27] Appellants argue that *Hardy* should not control the decision in this case and that the two cases are distinguishable.[28] AT&T claims *Hardy* is on point and urges this Court to follow it.[29]

The facts in *Hardy* are somewhat similar to the facts in this case. In *Hardy*, Appellants Michael J. Hardy and Michael Lair brought class action lawsuits in the King County Superior Court against Claircom Communications Group, Inc., d/b/a AT&T

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[24] *Cutler v. Phillips Petroleum Co.*, 124 Wash. 2d 749, 755, 881 P.2d 216 (1994), *cert. denied*, 515 U.S. 1169, 115 S. Ct. 2634, 132 L. Ed. 2d 873 (1995).

[25] *Hoffer*, 110 Wash. 2d at 420 (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure 1357, at 604 (1969)); *Orwick v. City of Seattle*, 103 Wash. 2d 249, 254, 692 P.2d 793 (1984).

[26] 86 Wash. App. 488, 937 P.2d 1128 (1997).

[27] Order of Dismissal. Clerk's Papers at 279.

[28] Br. of Appellants at 23.

[29] Br. of Resp'ts at 6-7.